No. 42159-3-II
Thurston County Cause No. 10-2-00363-8

COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGTON

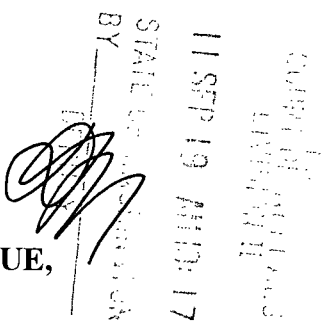
DONALD R. WATTS, DONALD L. ODEGARD, AND STEPHEN D. BANNWORTH,

Appellants,

v.

WASHINGTON STATE DEPARTMENT OF REVENUE,

Respondent.



REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

"A valid excise tax must [(1)] be imposed upon a voluntary act of the taxpayer, which affords the taxpayer the benefits of the occupation, business, or activity that triggers the taxable event;... [and (2)] be directly imposed based upon the extent the taxpayer enjoys the taxable privilege." *Sheehan v. Transit Auth.*, 155 Wn.2d 790, 800, 123 P.3d 88 (2005). In addition, an excise tax may not be applied to the right to own or hold property. *Harbour Village Apts. v. Mukilteo*, 139 Wn.2d 604, 611, 989 P.2d 542, (1999). If an excise tax applies to mere ownership of property, it is a property tax that must be uniform, or is unconstitutional. Const. art. VII, § 1.

The REET[1] applies to the sale or transfer of real property located in Washington. The Disputed Excise Tax assessed under RCW §§ 82.45.010 and 82.45.030, (1) is a tax on the transfer of real property, not a tax on the transfer of a controlling interest in an entity; and (2) results in extending the tax base beyond the economic privilege enjoyed by the taxpayer in the transfer of real property.

Not an Excise Tax on the Transfer of an Interest in an Entity. There is no Washington statute that imposes an excise tax on the sale of

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[1] Terms defined in the Opening Brief of Appellants are used here without redefinition.

an interest or a controlling interest in a corporation or partnership except to the extent the entity owns real property located in Washington. The sale of 50% or more of a business entity that does not own Washington real property is not subject to the REET. RCW §§ 82.45.010 (2)(a) and 82.45.033 (1)(a). RCW § 82.45.010 (1) defines "sale" as "any conveyance, grant, assignment, quitclaim, or transfer of the ownership of or title *to real property*." (Emphasis added.) The REET is applied to the transfer of an interest in a business entity only when the entity owns Washington real property and 50% or more of the ownership of the entity is transferred. In such cases, the REET is only valid to the extent of the value of the real property transferred. RCW §§ 82.45.010 and 82.45.030.

Closing a Loophole. The DOR states that the 1993 act change of control provisions were primarily designed to close a "sizeable loophole" that existed at the time. Br. of Resp't at 24-25. However, the change of control provisions are a road map for avoidance. For example, suppose A owns A LLC, which owns Washington real property. A sells 49.99% of A LLC to B. AB LLC distributes the real property to A and B as tenants in common. Then A sells his 50.01% undivided interest in the real property to C, and thus avoids the REET on 49.99% of the

property. Alternatively, A could transfer real property to an LLC, sell 49% to B on December 31, wait a year and a day to transfer another 49% and then another year and a day to transfer the remaining 2%, thus avoiding all REET.

Undisputed Facts. Taxpayers transferred a 50.01% interest in 100 Circles. The fair market value of the underlying Property actually owned, transferred and sold by Taxpayers was only $31,319,300, which is 50.01% of $62,626,074.79. The remaining 49.99% of the Property's value, owned by ConAgra through its 49.99% interest in 100 Circles and having a fair market value of $31,306,774.79, was not owned, transferred or sold by Taxpayers. The Taxpayers paid total REET of $1,320,643; of that amount $478,993.65 relates to the portion of 100 Circles owned by ConAgra, which Taxpayers did not transfer and did not receive consideration for. The percentage ownership of the underlying real property transferred by Taxpayers to ConAgra is indistinguishable from the percentage ownership that would have been transferred if 100 Circles had made a *pro rata* distribution of all of its real property to Taxpayers and ConAgra, and then Taxpayers had transferred their 50.01% tenant in common interest to ConAgra. The resulting REET liability is, as set forth above, significantly different.

The DOR justifies the unfair result of the Disputed Excise Tax by stating that the Taxpayers transferred control of 100 Circles, yet under the terms of 100 Circles operating agreement, the Taxpayers shared management control and income equally with ConAgra. There was no "control" by the taxpayers prior to the transfer. It is inaccurate to assert that the imposition of an entity layer of ownership enhances the value or privilege to the Taxpayer, when in either case the percentage interest transferred and consideration received by Taxpayers is the same.

II. ARGUMENTS

1. Taxpayers have met their burden of proof and are entitled to a refund of the Disputed Excise Tax of $478,993.65, plus interest as provided by RCW § 82.32.060.
2. The Disputed Excise Tax is an invalid excise tax because it is not directly imposed on the extent to which Taxpayers enjoyed the privilege of transferring *real* property (*Sheehan*, 155 Wn.2d at 800);
3. The Disputed Excise Tax is an invalid excise tax because it is imposed on the right to own or hold property rather than the voluntary act of the Taxpayers (*Harbour Village Apts.*, 139 Wn.2d at 611);

4. The Disputed Excise Tax is an unconstitutional, nonuniform property tax under the Washington Constitution (Const. art. VII, § 1; *Harbour Village Apts.*, 139 Wn.2d 604, 989 P.2d 542, (1999)); or

5. The Disputed Excise Tax is unconstitutional under the Equal Protection and Due Process Clauses of both the United States Constitution and the Washington State Constitution.

III. BURDEN OF PROOF

A party asserting that a legislative enactment is unconstitutional bears the burden of establishing that the legislation is unconstitutional beyond a reasonable doubt. *Washington State Grange v. Locke*, 153 Wn.2d 475, 486, 105 P.3d 9 (2005). The "reasonable doubt" standard, in the context of a statute being challenged as unconstitutional is not an evidentiary standard that requires a subjective state of certitude of the facts in issue. *Island County v. State*, 135 Wn.2d 141, 147, 955 P.2d 377 (1998). Rather, the one challenging a statute must, by argument, searching legal analysis and research, convince the court that there is no reasonable doubt that the statute violates the constitution. *Id.* at 147.

Taxpayers have explained how the result in this case leads to the conclusion that the Disputed Excise Tax is invalid and unconstitutional

through the requisite legal analysis and arguments, and in so doing have met their burden of proof. Any of the following arguments, standing alone, are at least equivalent to the strength of the argument advanced by the taxpayers in *Harbour Village Apts*. In that case, the burden of proof was a non-issue.

IV. THE DISPUTED EXCISE TAX IS INVALID BECAUSE IT IS IMPOSED WITHOUT A VOLUNTARY ACT OF TRANSFER AND IS NOT BASED ON THE EXTENT TO WHICH TAXPAYERS ENJOYED A TAXABLE PRIVILEGE

The Disputed Excise Tax that was imposed on the Taxpayers based on the value of the ConAgra Portion is an invalid excise tax because: (1) the REET was imposed where there was no voluntary act by Taxpayers with respect to the transfer and sale of the ConAgra Portion, and, therefore, there was no event or nexus linking the ConAgra Portion to the REET; and (2) the REET imposed on the ConAgra Portion of 100 Circles was not directly imposed based upon the extent to which the Taxpayers received consideration for the transfer of real property and thus, was beyond the taxable privilege enjoyed by Taxpayers. *Covell v. Seattle*, 127 Wn.2d 874, 891, 905 P.2d 324 (1995); *Black v. State*, 67 Wn.2d 97, 99, 406 P.2d 761 (1965); *Harbour Village Apts.*, 139 Wn.2d at 612; *Sheehan*, 155 Wn.2d at 800.

No Voluntary Act. In order for an excise tax to be valid, *Sheehan, Black* and *Covell* require that the excise tax be imposed on a voluntary act, which not only affords the taxpayer the benefits of the activity, but which triggers the taxable event.

In this case, the *only* voluntary act with respect to the ConAgra Portion occurred years before Taxpayers' sale to ConAgra when the Taxpayers and ConAgra chose to hold real property that was used in a business operation, in an entity which affords limited liability protection. Because the act that was taxed is the form of ownership, there is no voluntary act at the time of sale, and the incidence of the Disputed Excise Tax is on the Taxpayers' and ConAgra's choice to own the property through a business entity.

The proper measure of the extent of the voluntary act by the Taxpayers is the consideration received for their interest in 100 Circles. The Taxpayers received consideration for precisely 50.01% of the assets of 100 Circles, and accordingly, there was *no premium* received by the Taxpayers for selling a "controlling interest." Consequently, there was no voluntary act with respect to the 49.99% interest to which an excise tax could be properly applied.

REET Not Directly Imposed To Extent of Privilege Enjoyed.

The imposition of the Disputed Excise Tax was not based on the extent to which Taxpayers enjoyed the privilege or the economic benefit of transferring their interest in 100 Circles. *Sheehan* involved an excise tax imposed based on the value of the motor vehicle being licensed for use on public roadways. In *Sheehan*, the Court found that, "the relationship between the legitimate decision to tax the privilege of relicensing a motor vehicle for use on public roadways and the method of using the value of a vehicle as the measure of that privilege is sufficient to avoid any constitutional infirmity." *Sheehan*, 155 Wn.2d at 802. If the motor vehicle excise tax imposed in *Sheehan* had been imposed on the same basis as the Disputed Excise Tax in this case, the excise tax would have been imposed on not only the value of the vehicle being relicensed, but also the value of an additional vehicle, owned by the taxpayer's business partner, that was not being relicensed.

In this case, the consideration received and thus, the extent of the privilege enjoyed, was limited to the value of the 50.01% interest in 100 Circles that was actually transferred and for which Taxpayers received consideration. To impose the REET on the value of an interest that was not transferred and for which no consideration was received, is well

beyond what the Washington Supreme Court has established in *Sheehan* as a valid and constitutional application of an excise tax on the value of the underlying property.

The second prong of the test for a valid excise tax set forth in *Sheehan*, *Covell, Black* and *Harbour Village Apts.* was not satisfied because the Disputed Excise Tax was not imposed based on the extent to which the Taxpayers enjoyed the taxable privilege of transferring real property.

Precise Fit Argument from *Sheehan*. In *Sheehan*, the taxpayer argued that the excise tax was not adequately based on the extent of the privilege enjoyed of licensing the vehicle for use on the roadways. The court found that while it might be possible to create a more precise measure of the privilege enjoyed, a "precise fit" was not required in order for the tax to pass constitutional muster - the value of the vehicle being licensed was a sufficient measure of the taxable privilege. *Sheehan*, 155 Wn.2d at 801. The *Sheehan* Court's precise fit analysis is inapplicable to the present case because of the wide gap between the statutorily prescribed measure of the taxable privilege and the actual value transferred.

In the instant case, Taxpayers transferred 50.01% of 100 Circles, yet were required to pay REET on the value of the underlying real property represented by not only the 50.01% actually transferred, but the other 49.99%, which was not owned by Taxpayers, was not transferred by Taxpayers and for which Taxpayers received no consideration. As noted above, to put the facts in *Sheehan* on an equal footing with the facts in this case would result in a taxpayer licensing a motor vehicle being required to pay a tax based on the value of the vehicle being licensed, plus an additional vehicle not owned by the taxpayer. Taxpayers assert that the measure of the privilege enjoyed in this case with respect to the Disputed Excise Tax is so far removed from the actual privilege enjoyed by the Taxpayers as to be beyond the scope of the precise fit reasoning contained in *Sheehan*. Accordingly, the Taxpayers should only be required to pay the REET measured by the value of the real property they actually transferred and for which consideration was received, which is in harmony with the holding in *Sheehan*.

V. THE REET IS INVALID BECAUSE IT IS A TAX ON THE RIGHT TO OWN AND HOLD PROPERTY

As stated by both the United States Supreme Court and the Washington Supreme Court, an excise tax may not be imposed on the right to own and hold property. *Dawson v. Kentucky Distilleries &*

Warehouse Co., 255 U.S. 288 (1921); *Harbour Village Apts.*, 139 Wn.2d at 608; *Jensen v. Henneford*, 185 Wash. 209, 218, 53 P.2d 607 (1936); and *Apartment Operators Ass'n of Seattle, Inc. v. Schumacher*, 56 Wn.2d 46, 47, 351 P.2d 124 (1960). "[T]he mere right to own and hold property cannot be made the subject of an excise tax, because to tax by reason of ownership of property is to tax the property itself." *Jensen*, 185 Wash. at 218, citing *Dawson*, 255 U.S. 288.

The Washington Supreme Court has stated, "the character of a tax is determined by its incidents, not by its name." *Jensen*, 185 Wash. at 217. Accordingly, the Disputed Excise Tax is not an excise tax merely because it is called one. An "excise tax" is an "obligation ... based upon the voluntary action of the person taxed in performing the act, enjoying the privilege or engaging in the occupation which is the subject of the excise, and the element of absolute and unavoidable demand, as in the case of a property tax, is lacking." *Covell*, 127 Wn.2d at 889, citing *High Tide Seafoods v. State*, 106 Wn.2d 695, 699, 725 P.2d 411 (1986). As previously stated, the only voluntary act with regard to the ConAgra Portion was the choice, years before the sale at issue here, by Taxpayers and ConAgra to own the real property in a business entity. There is no difference in the percentage interest in the

underlying property that is transferred whether there is a direct transfer of an undivided tenant in common interest or an equivalent percentage interest in an entity. Accordingly, the incident of the Disputed Excise Tax is the form of ownership of the real property, not the actual transfer of the real property, and that is a property tax.

Tax on Mere Ownership is a Property Tax – *Harbour Village Apts.* In *Harbour Village Apts.* the "incident" or measure of the tax was the mere ownership of the subclass of real property defined by its use. Each unit of rental property was taxed regardless of whether it was actually rented, the number of transactions associated with the given unit, or any other factors usually associated with business activity, such as income. To tax the rental property where no activity occurred was to tax by reason of ownership. *Harbour Village Apts.*, 139 Wn.2d at 608, citing *Jensen*, 185 Wash. at 218. Similarly, in this case, to tax the value of the 49.99% of 100 Circles, which was not owned or transferred by Taxpayers, is equivalent to the application of the tax in *Harbour Village Apts.* to the rental units that were not actually rented. There was no activity with respect to the ConAgra Portion, no transfer occurred. ConAgra did not pay and Taxpayers did not receive more consideration than the *pro rata* value of 50.01% of the underlying real property.

Taxpayers were taxed on the value of the ConAgra Portion based merely on the form of ownership of the real property, or in other words, based on their right to own or hold real property in an entity, rather than as tenants in common.

That the REET is applied to the mere ownership of real property is demonstrated by comparing the excise tax liability that results from a transfer of the 50.01% interest in 100 Circles with a transfer of a 50.01% undivided tenant in common interest in the same real property. The only difference between these two transfers is the limited liability form of ownership, but because the Taxpayers and ConAgra chose to own the property in a limited liability entity, the REET computed on the transfer of the 100 Circles interest was twice the amount that would result from a direct transfer of a 50.01% interest in the real property.

VI. THE DISPUTED EXCISE TAX IS AN UNCONSTITUTIONAL NONUNIFORM PROPERTY TAX UNDER WASHINGTON CONSTITUTION ARTICLE VII, § 1.

A property tax is based on the value of property and is imposed on the mere ownership of tangible property, while an excise tax is levied against the exercise of a particular aspect of ownership. *Harbour Village Apts.*, 139 Wn.2d at 611; and *Covell*, 127 Wn.2d at 890-91. The Disputed Excise Tax is not a valid excise tax because it was imposed on

the mere ownership of property. *Jensen*, 185 Wash. at 218. None of the aspects of ownership associated with either the 49.99% interest owned by ConAgra in 100 Circles, or 49.99% of the underlying value of 100 Circles' real property, were exercised by Taxpayers to justify the imposition of the Disputed Excise Tax. No consideration changed hands related to the ConAgra Portion, and the ownership of that 49.99% was the same before and after the sale. Because the "character of a tax is determined by its incidents, and not by its name," the Disputed Excise Tax, which was imposed on the mere form of ownership of the ConAgra Portion, should be properly characterized as a property tax. *Jensen*, 185 Wash. at 217. As a property tax, the Disputed Excise Tax is invalid because it fails to conform to the Washington Constitutional requirement of uniformity for property taxes. Const. art. VII, § 1.

i. Washington State Constitutional Prohibition of Nonuniform Taxation.

The Washington constitutional provision governing property taxes states that, "[a]ll taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax and shall be levied and collected for public purposes only." Const. art. VII, § 1. Because the application of the REET to the ConAgra Portion functioned as a tax on the ownership of property, it is a property tax, and therefore

must conform to the Washington state constitutional constraints on nonuniform property taxes. *Jensen*, 185 Wash. at 217.

ii. Nonuniform Rate, Nonuniform Measure.

The REET imposed on a change of control is not imposed at a uniform rate or on a uniform measure. The tax rate of the REET on a direct transfer of real property, i.e., the transfer of an undivided, tenant-in-common interest, is approximately 1.53%. In this case, the effective rate of the REET on a transfer of the interest in 100 Circles was 3.06% ($958,178.94 total tax on 100% of the value of 100 Circles real property divided by 50.01% of the value of the underlying 100 Circles real property, or $31,319,300). The measure of the tax, or tax base, in a direct transfer is the value of the real property actually transferred; in this case that amount *should be* $31,319,300. The measure of the REET on a change of control is 100% of the value of the Washington real property held by an entity in which 50% or more of the ownership is transferred; in this case that amount is $62,626,074.79.

The application of the REET to the ConAgra Portion resulted in a taxpayer, who holds a fractional interest in real property via a business entity, being taxed at virtually twice the tax rate that a taxpayer who holds the same fractional interest directly, would pay as a tenant in

common. Accordingly, the tax on the ConAgra Portion was a nonuniform property tax when compared to other forms of ownership. This nonuniform treatment based on the form of ownership is unconstitutional because taxing the ConAgra Portion, which was not actually transferred, was effectively a tax on the right of someone, other than the transferor, to own that property, and therefore was a property tax rather than an excise tax.

VII. MISCHARACTERIZATIONS AND MISSTATEMENTS

While the Taxpayers realize the DOR is in the awkward position of trying to rationalize a tax which is clearly unfair and illogical, Taxpayers object to the DOR's misstatements and continued mischaracterization of case law.

DOR Misstatements.

1. "When the tax is triggered by the sale of a 'controlling interest,' the selling price upon which the tax is measured is the fair market value of the real property owned by the entity." Br. of Resp't at 1. The DOR then cites to *McFreeze Corp. v. Dept. of Revenue,* 102 Wn. App. 196, 6 P.3d 1187 (2000), which did not address any of the validity, incidence or uniformity issues advanced by the Taxpayers in the instant case.

2. The DOR argues that because the 1993 addition of the change of control provisions to the REET closed a "sizeable loophole" those additions to the challenged statute are constitutionally valid. While the change of control provisions are justified as to the portion of the entity transferred, the mere legislative intent does not correct the validity and constitutional infirmities addressed herein.

3. DOR states, "The sellers cite no authority supporting their assertion that prorating the tax is required ...." Br. of Resp't at 10. Taxpayers have not attempted to avoid paying the REET on the real property actually transferred. Taxpayers have argued that the excise tax should be uniform, that the amount of the tax should be the same as if Taxpayers had transferred a 50.01% undivided interest in the underlying real property. Taxpayers have cited *Sheehan*, *Black* and *Covell* for the proposition that the Disputed Excise is invalid, cited *Harbour Village Apts.* for the proposition that an excise tax may not be applied to the ownership of property and the Washington Constitution for the uniformity requirement.

4. DOR states, "there is nothing inherently unfair about the manner in which the Washington Legislature has designed the tax." Br. of Resp't at 10. As applied in the present case, the tax rate on the

transfer of a 50% interest in an entity is double that of a direct transfer of the same amount of property for the same consideration. The Taxpayers submit that this disparity in tax rates, based on nothing more than the form of ownership a taxpayer chooses with respect to a parcel of real property, is inherently unfair.

5. DOR ignores the 100 Circles operating agreement when it states, "Before the sale, the *seller* had control over the entity and, indirectly, all the Washington real property owned by the entity." Br. of Resp't at 10-11. This statement is categorically false; Taxpayers and ConAgra shared management control equally under the terms of the operating agreement. *See* Stip. Ex. No. 1.

6. DOR states, "the tax as applied to the sale of a controlling interest is not materially different than the tax as applied to the sale of land. In either case, it is the act of selling the property (the land or the controlling interest) that gives rise to the tax obligation." Br. of Resp't at 13, citing RCW § 82.45.060. As discussed above, the tax applied to a change of control in the present case is materially different than the tax that would have applied to the direct sale of land. In this case the difference is $478,993.65, which doubles the excise tax on the 50.01% interest in 100 Circles. Taxpayers submit that $478,993.65, or double

the amount of tax, is material. Again, the REET is an excise tax applied to the transfer of real property, not an interest in an entity, yet the DOR seeks to justify an additional $478,993.65 in tax based solely on the form of ownership of the real property.

7. DOR states, "an excise tax may be measured by the value of property so long as there is a rational connection between the activity being taxed and the property used to measure the tax," citing *Sheehan*, 155 Wn.2d at 801. DOR then states, "The measure of the real estate excise tax as applied to the sale of a controlling interest is entirely rational." Br. of Resp't at 14. In reaching the foregoing conclusion, DOR misapplies the precise fit analysis set forth in *Sheehan*. In that case the court determined that the value of the vehicle being licensed was an adequate measure of the taxable privilege of licensing the vehicle. Nowhere in the case is the word "rational." Taxpayers submit that there is nothing rational about taxing a transfer as if $62 million of real property had been transferred when only $31 million was actually transferred.

8. DOR states, "the real estate excise tax ... is not imposed on the mere ownership of real property." Br. of Resp't at 16. As stated previously, the Taxpayers' transfer of their 50.01% interest in 100

Circles to ConAgra reaches precisely the same ownership result as if Taxpayers transferred a 50.01% tenant-in-common interest to ConAgra, but results in twice the tax liability. Since there has been no transfer of the remaining 49.99% of 100 Circles, the Disputed Excise Tax is imposed on the mere form of ownership of the property.

9. DOR states, "The sellers do not clearly identify the constitutional provision they rely on to support their claim that the real estate excise tax is 'invalid.'" Br. of Resp't at 17. On the contrary, Taxpayers have clearly identified extensive authority. *See e.g.,* Opening Br. of Appellants pp. 34-41.

10. The DOR states that the REET as applied to a change of control is "essentially equivalent" to the sale of real property held by the entity.[2] Br. of Resp't at 20. To the contrary, as illustrated above, the application of the REET to a change of control in the present case results in twice the tax liability as would result from a transfer of an equivalent percentage interest held directly as a tenant in common.

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[2] The DOR cited to Laws of 1993, 1st Spec. Sess., ch. 25 § 501(1). However, the phrase "essentially equivalent" does not appear in the attached cited material.

Mischaracterizations of Case Law.

The DOR cites *In re McGrath's Estate*, 191 Wash. 496, 504, 71 P.2d 395 (1937) for the proposition that, "when control or other economic benefit over property is transferred, the Legislature may exercise its plenary power of taxation by imposing an excise tax measured by the value of the associated property." Br. of Resp't at 14. However, *McGrath* does not support this proposition. *McGrath* dealt with the predecessor of I.R.C. § 2036, which included in the value of a decedent's gross estate any asset with respect to which the decedent retained possession, enjoyment or the right to designate a beneficiary. In that case, the decedent had a number of insurance policies in which the decedent retained the right to name or change the beneficiary of the policy without the consent of any of the existing beneficiaries. The value of those policies were included in the decedent's estate, even though decedent did not "transfer" those policies at death, because decedent retained a sufficient power to designate the beneficiaries for those policies. The DOR's use of *McGrath* is misleading because it does not stand for the general proposition stated by the DOR (quoted above), and is irrelevant because the Taxpayers had no similar right to ConAgra's 49.99% of 100 Circles. Because the DOR's use of *McGrath* is

misleading, the court should disregard the entire second paragraph of pages 14-15 of the Br. of Resp't.

DOR again cites *Mahler v. Tremper*, 40 Wn.2d 405, 243 P.2d 627 (1952), which they claim supports the proposition that the REET on a direct transfer of real property is a valid excise tax. Br. of Resp't at 13. *Mahler* did not address a change of control. *Mahler* is irrelevant because Taxpayers do not dispute the REET as to the 50.01% of 100 Circles actually transferred. The DOR states that the Disputed Excise Tax is not materially different than the tax applied to the sale of land. Taxpayers submit that $478,993.65 is a material difference. The DOR also thinks this amount is material, or it would have already issued a refund to Taxpayers. Proceeds of this sale were exactly what Taxpayers would have received on a direct transfer, but DOR imposed twice the tax rate merely because of the form of ownership. Twice the tax rate is material.

DOR cites *Sheehan* and again misuses the precise fit argument made by the taxpayer that the value of the vehicle being licensed was not a precise measure of the taxable privilege enjoyed of using a motor vehicle on public roads. DOR cites *Sheehan* for the proposition that "the measure of the tax, without more, does not make it a property tax." Br.

of Resp't at 13. However, in *Sheehan*, the measure of the tax at issue was limited solely to the value of the vehicle being licensed, which is precisely what the Taxpayers seek in this case. *Sheehan* did not approve of measuring a tax by the value of the vehicle plus the value of another vehicle not even owned by the taxpayer. The Washington Supreme Court has stated, "the character of a tax is determined by its incidents, not by its name." *Jensen*, 185 Wash. at 217. In the present case, the incidents of the Disputed Excise Tax is the form of ownership of the underlying real property. Without the entity layer of ownership, the Taxpayers would be transferring an undivided interest in real property for which the tax would be half. As noted above, if the Taxpayers had sold their 50.01% to another buyer, that buyer would have no more than 50/50 control over the underlying real property pursuant to the terms of the 100 Circles operating agreement.

VIII. CONCLUSION

The "reasonable doubt" standard used when a statute is challenged as unconstitutional requires a searching legal analysis to convince the court that the statute violates the constitution. *Island County*, 135 Wn.2d at 147. Taxpayers have clearly sustained this burden with the legal analyses above that articulate that the Disputed

Excise Tax is invalid because it does not fit the definition of a valid excise tax, is technically invalid because ownership of property may not be made the subject of an excise tax or is unconstitutional because the Disputed Excise Tax functions as a property tax, which is nonuniform in its rate and measure. Each of these arguments is distinct and provides a separate example of how the Taxpayers carry the burden of proof by articulating clear legal arguments of how and why the statute is technically invalid. Taxpayers go well beyond the arguments and rationale provided by the taxpayers in *Harbour Village Apts.*, who were successful in their challenge of a statute.

For the reasons stated above, Taxpayers respectfully request that the Court find that the Disputed Excise Tax at issue in this case was improperly assessed and collected from the Taxpayers and award the Taxpayers a refund of $478,993.65, plus interest as provided by RCW § 82.32.060, on the tax collected.

RESPECTFULLY SUBMITTED this 15th day of September, 2011.

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PROOF OF SERVICE

I HEREBY CERTIFY that I served a copy of this Reply Brief of Appellants via U.S. Mail, postage prepaid and electronically via agreement on September 15th, 2011:

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I HEREBY CERTIFY under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 15th day of September, 2011, at Boise, Idaho.

Tessa A. O'Donnell